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IN THE

Supreme Court of the United States

October Term, 1958.

No. 539

INDUSTRIAL WAXES, INC., a corporation,

Petitioner,

against

GERALD FEW BROWN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Industrial Waxes, Inc. (having principal office at Cincinnati, Ohio), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Judges Lumbard, Waterman and Moore) dated July 31, 1958. The judgment sought to be reviewed reversed a judgment of the District Court awarding the petitioner $43,803.00, with interest.

Opinions Below

The opinion of the District Court is reported at 160 F. Supp. 230 (Transcript, pp. 113a-127a). The opinion of the Court of Appeals has not yet appeared in the Advance Sheets of the Federal Reporter. It is printed in full in the appendix hereto, pages 1a-10a.

Jurisdiction

The judgment of the Court of Appeals was entered July 31, 1958. Petitioner's timely motion for a re-hearing,

dated August 14, 1958, was denied by the Court of Appeals by order dated October 8, 1958 (Transcript, pp. 140a-146a; p. 148a).

The jurisdiction of this Court is invoked pursuant to the provisions of Section 1254(1) of Title 28 United States Code.

The jurisdiction of the District Court was based on diversity of citizenship under 28 U. S. C. A. Sect. 1332, which then provided:

> "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000. exclusive of interest and costs, and is between:
>
> (1) * * *.
>
> (2) Citizens of a State and foreign states or citizens or subjects thereof."

The Questions Presented

1. Whether a policy of marine insurance specifically covering a described voyage can be avoided by construction of certain other language of the policy of general applicability.

2. Whether the insurance under a marine policy specifically covering goods while in customs can be avoided on an assumption that the status of holding in customs was one of independent warehousing or storage.

3. Does a temporary holding in customs at a foreign port en route to final destination constitute an interruption of transit so as to defeat the contractual coverage of the entire voyage.

4. Whether a "held covered" clause (quoted hereinafter, p. 6) gives rise to a new and additional risk as against an extension of a risk already undertaken by the policy.

5. Whether the Court of Appeals can make findings inconsistent with those of the District Court in the absence of any evidence to support its findings.

Statement of Facts

Practically all the facts pertinent to the questions presented were stipulated by the parties and are embraced in a pre-trial order (Transcript, pp. 24a-32a). These facts were supplemented by uncontroverted testimony and are all marshalled in the opinion of the District Court (Transcript, pp. 113a-127a). They are briefly as follows:

Prior to the shipment of the subject goods, and for a number of years previous thereto, the underwriters at Lloyd's had issued each year to the petitioner a Memorandum of Open Cover which agreed to insure shipments to be made by the petitioner and which indicated the coverage, conditions and rates of premium applicable thereto. The petitioner was also supplied with forms of "Lloyd's Certificate of Insurance" upon which each insured shipment and its course of voyage was to be described and the coverage identified. When completed, the certificates of insurance constituted "the contract or policy of insurance" (Transcript, p. 120a).

Two shipments are here involved. They were the last of an order comprising five shipments. The previous shipments traveled a like course and arrived at ultimate destination, Santiago, Chile. All shipments were to shipper's order, notify Sociedad Nacional de Velas S.A. of Santiago, Chile, the consignee (Transcript, p. 118a; pp. 46a, 49a).

Prior to the shipments an import license had issued which was a prerequisite for the entrance of the goods into Chile (Transcript, pp. 64a, 115a). All shipments were insured against "all and every loss or damage of whatsoever nature" (Transcript, pp. 46a, 49a). The two shipments in question, each embraced in a separate certificate,

were insured at a total value in American dollars of $43,803.00

> "at and from Tulsa, Okla. via New Orleans, La. to Santiago, Chile via Valparaiso" (Transcript, pp. 46a, 49a).

In effect, and specifically by other text of the certificates, the insured voyage is comprehensively described as warehouse to warehouse, to wit (Transcript, pp. 47a; 50a):

> "* * * from the time the goods leave the warehouse at the place named in the policy for the commencement of the transit and continues until the goods are delivered to the final warehouse at the destination named in the policy * * *."

Each certificate here involved also had endorsed thereon:

> "Insure customer against all risks to customer's warehouse also particular average and *loss in customs.*" (Italics ours) (Transcript, pp. 46a; 49a)

The certificates, further, read in part:

> "This insurance specially to cover the goods during (1) deviation, delay, forced discharge, re-shipment and transhipment" (Transcript, pp. 47a; 50a).

Thus, the warehouse to warehouse transit was covered in all its incidents.

The schedule of rates contained in the Memorandum of Open Cover listed, among others, separate premiums for shipments destined for interior points on the west coast of South America and for those destined for ports on the said west coast (Transcript, p. 34a). Since the coverage above described insured the shipments to the warehouse of the consignee at the interior city of Santiago, the petitioner paid the premiums to that point (Transcript, p. 27a).

One of the shipments left Tulsa, Oklahoma, on March 30, 1951 and arrived at Valparaiso on May 4, 1951. The

second shipment left Tulsa, Oklahoma on May 18, 1951 and arrived at Valparaiso on July 8, 1951 (Transcript, p. 27a).

Valparaiso is a recognized port of entry at which ocean going vessels discharge cargo for further transit to interior points of destination (Santiago). It is also the location of customs where such cargoes are to clear (Transcript, p. 28a).

Upon arrival at Valparaiso each shipment was placed in customs, and there remained until destroyed by fire on October 5, 1951 (Transcript, p. 27a). The periods during which the shipments remained in customs prior to destruction were, therefore, approximately three months as to one and five months as to the other. Similar periods of holding in customs were encountered by the previous shipments (Transcript, pp. 115a-116a). As to these periods of holding the District Court found (Transcript, p. 115a):

> "But a delay of this length in a customs warehouse pending entry was neither unusual nor unexpected and was long a matter of common knowledge to exporters to the west coast of South America. I find all parties chargeable with knowledge of these conditions."

The Court of Appeals subscribes to the finding, saying (Appendix hereto, p. 3a):

> "The undisputed finding of the trial court was that 'a delay of this length in a customs warehouse pending entry was neither unusual nor unexpected and was long a matter of common knowledge to exporters to the west coast of South America'."

The delivery into customs was mandatory and not at the volition of the petitioner or consignee. The retention in customs was subject not alone to the authority of the customs officials, but also to the action of other Chilean governmental officials entrusted with the control of foreign currency. Here it was necessary that a governmental agency known as Condecor authorize the release of U. S.

dollars to permit the consignee to pay for the shipments at invoiced amount and also to pay for duties (Transcript, pp. 67a-69a). As a preliminary step the consignee had deposited with the Banco de Chile a sum sufficient in pesos (Chilean currency) to permit exchange and conversion into dollars as and when premission to do so would be forthcoming. In fact, all necessary arrangements therefor had been made. The finding of the District Court was (Transcript, p. 125a):

> "Sonavelas (the consignee) had made the necessary deposits of pesos and other arrangements with the Banco de Chile to effect the payment of the drafts; the issuance of the Chilean import license was in effect a guarantee that dollars would be available, without a guarantee of time as to when this would be. Condecor had not released the dollars. In any event, the sight drafts had not been met when the loss occurred.
>
> I find no evidence to support a finding that plaintiff neglected to take all reasonable steps to secure payment of the drafts."

At this point, to aid in the understanding of the opinion of the Court of Appeals, we cite the fact that the certificates recites two clauses, to wit:

> "Including, if so declared hereon, risk whilst in store after arrival at port of discharge or in warehouse after arrival at final destination for thirty days thereafter held covered at an additional premium." (Transcript, pp. 46a; 49a)
>
> "Includes risk for additional thirty days after discharge from the vessel." (Transcript, pp. 46a; 49a)

The implications from these clauses are discussed in the argument, but we repeat here that the holding in customs was in customs precinct itself—not in a warehouse operated for hire. It was a facility made available by the governing authorities to meet their requirements of taking and retaining dominion over the goods until payment of duties and

the other requirements of law were met. Moreover, release from customs was not at the convenience of the petitioner or the consignee, but only by the customs authorities after Condecor had permitted conversion of pesos into dollars. When that could be was solely within the discretion of the governmental authorities and agencies of Chile in its program of relating foreign exchange to the economic interests of the country.

Immediately upon the loss of the shipments in customs underwriters were notified, and they caused a survey of the loss to be made (Transcript, p. 28a). There was no denial of liability at that time, and at no time since has there been any demand by the underwriters for additional and unpaid premium supposedly due them. Rather, underwriter's attention seems to have been directed to the existence of another insurance policy, described hereinafter, and efforts to have the petitioner assert and first prosecute a claim against that policy without prejudice to the position of either party under Lloyd's policy (Transcript, p. 29a). The circumstances under which this other policy was obtained are stated below.

It seems to have been the custom, if not a requirement of law, that goods entering into Chile and remaining there for thirty days or more must carry insurance written by a domestic insurance company (Transcript, pp. 75a; 111a). Accordingly, the Banco de Chile, which was in constructive possession of the goods because of the holding of the shipping documents, obtained insurance with a Chilean insurance company covering the goods at location (Transcript, p. 29a). This insurance was in no respects identical with Lloyd's; it was in pesos only, whereas Lloyd's policy was in dollars. Further, the Chilean policy was against the risk of fire only (Transcript, p. 29a), whereas Lloyd's policy was against "all risks" up to the time of arrival of the goods at the point of destination, i.e., Santiago.

Supplemental and collateral facts are noted in the course of the argument.

ARGUMENT

Warehouse to warehouse coverage was not limited by time or event and cannot be arbitrarily curtailed.

Placement of goods in customs en route did not constitute storage; was not adverse to the transit coverage.

Coverage was plainly stated, not only in one place, but repeatedly.

On the face of the certificates the insured voyage was stated to be to "Santiago, Chile via Valparaiso." It was from warehouse at place of commencement of voyage "to final warehouse at the destination named in the policy."

The last quoted language is from the text of the Cargo Clauses (Wartime Extension) printed on the reverse side of the certificates (Transcript, pp. 47a; 50a). It differs from the clause which by reference in the Memorandum of Open Cover embodies text of Institute Cargo Clauses. The certificates state that Clauses 1, 3 and 4 of the former text are deleted and new texts substituted (Transcript, pp. 47a, 50a). The deleted text comparable to the present warehouse to warehouse clause reads as follows (Transcript, p. 41a):

> "This insurance attaches from the time the goods leave the Warehouse and/or Store at the place named in the policy for the commencement of the transit and continues during the ordinary course of transit, including customary transshipment, if any, until the goods are discharged overside from the overseas vessel at the final port. Thereafter the insurance continues whilst the goods are in transit and/or waiting transit until delivered to final warehouse at the destination named in the policy or until the expiry of 15 days (or 30 days if the destination to which the goods are insured is outside the limits of the port) whichever shall first occur. * * * Held covered at a premium to be arranged in the event of transshipment, if any,

other than as above and/or in the event of delay in excess of the above time limits arising from circumstances beyond the control of the assured."

The important point of difference between the above quoted text and the superseding text of the warehouse to warehouse coverage here in effect is that there is omitted from the existing text any reference to a time limitation such as was contained in the deleted text.

All risks of the voyage were covered so explicitly as to avoid any interposition of a situation which would expose a risk not covered. Thus, the period of holding in customs en route will be covered as a risk of the transit, but in our case this is doubly assured by the specific text of an endorsement on the policy reading (Transcript, pp. 46a, 49a):

> "Insure customer against all risks to customer's warehouse also particular average and *loss in customs.*" (Italics ours)

There was no limitation as to period of time that the goods could remain in customs. Presumably governmental authorities in charge of customs precincts would have their own rules as to length of time within which incoming shipments could be kept in customs.

We have no distinctions here between free time and storage time as appears sometimes in many types of bailments. Neither was there free coverage of storage intended, as stated by the Court of Appeals (Appendix hereto, p. 9a). As we have noted above, as between customs house and shipper the entire period of holding in customs was free. Had there been any incidental storage in course of transit from warehouse to warehouse, the full premium therefor had been paid. As will appear hereinafter, the endorsement which refers to a period of 30 days after discharge from vessel is not at all applicable at this point. There is nothing to indicate that this notation was put on the certificates because of the election of the petitioner to

avail himself of free coverage for thirty days, as assumed by the Court of Appeals. Intimations of this type were extensively discussed before the District Court, leading the District Court to state (Transcript, p. 123a):

> "* * * it is difficult to conclude that plaintiff by this customary and routine endorsement (such was the testimony) was unintentionally curtailing what it had intentionally extended; nor, assuming the endorsement had the effect contended by defendant, would this satisfactorily explain why defendant billed plaintiff at the higher rate."

Placement of goods in storage or warehousing thereof is a question of intent as well as of circumstance. If the petitioner had no intent to warehouse the goods in transit and did not in fact direct the warehousing, it cannot be said to have placed the goods in storage. Moreover, the delivery into customs here was not at the volition of the petitioner, but was imposed upon it by the laws of Chile. Neither the petitioner (shipper) nor the consignee could order the goods out of customs except for shipment, duty free, to another point foreign to Chile. That was a remedy available to the petitioner only at the peril of a breach of the contract with the consignee and exhaustion of the permission granted by the Import Permit.

The District Court found (Transcript, pp. 115a-116a):

> "Shipments frequently were required to remain in customs at Valparaiso pending release of clearance of dollars to meet the sight drafts and invoices which accompanied and were part of the shipping documents. This dollar clearance was under the control of and issued from an agency of the Chilean government, 'Condecor'. When the shipments had arrived in Chile, dollar exchange was tight and under strict control by Condecor; indeed prior shipments under the contract had also rested in customs at Valparaiso pending release of dollars for similar periods."

The reasoning of the Court of Appeals which leads it away from the conclusions of the District Court seems to be that when the shipment was placed in customs at Valparaiso it become *stored* or *warehoused* there entirely outside the coverage of the policy. This is not supported by anything in the record. The insurance not only specifically covered the goods while in customs, but also covered them as a risk of the transit and within the warehouse to warehouse coverage, as has been noted in the Statement of Facts.

Placement of cargoes in customs en route to destination has been specifically held to be still in transit. *Ocean Marine Ins. Co. v. Lindo*, 27 Fed. (2) 956, 958, aff'd 30 Fed. (2) 782. See also, *Ganiere* v. *Eastern Co.*, 7 Lloyd List Law Reports, 188.

In *Ocean Marine Ins. Co.* v. *Lindo*, 30 Fed. (2) 782, upon very similar facts, the Court of Appeals, Ninth Circuit, held that in the absence of some voluntary act of neglect on consignee's part indicating an intention to adopt the custom house as a place of storage, "the taking of the goods to the custom house for the purpose of clearance" did not accomplish "the safe deposit thereof in consignee's or other warehouse" referred to in the policy. The Court also said (p. 784):

> "Now the evidence shows that all goods going to Guatemala, whether dutiable or not, must pass through the custom house at San Jose, comply with customs regulations, and pay certain fees. Until these requirements are complied with, the consignee is not entitled to the possession of the goods. There was no unreasonable delay on the part of the consignee in the instant case. As a consequence it cannot be said, we think, that the goods were safely deposited in the consignee's or other warehouse within the meaning of the policy, while in custom house, regardless of the nature or character of the building or structure used by the government for the storage of goods while passing customs."

The above reasoning of the Court is consonant with the principle established by this Court in *The Columbian In-*

surance Co. v. *Catlett* case, 12 Wheaton 383, 6 L. Ed. 664, and with that in *Arnold* v. *The Pacific Mutual Life Ins. Co.*, 78 N. Y. 7, the principle being that when parties enter into a contract of insurance, particularly a marine policy, they do so with a view to the purpose of the insured voyage and the course of the trade. This Court, in *The Columbian Insurance Co.* case, *supra*, 6 L. Ed. 664, 667, said:

> "The parties, in entering into the contract of insurance, are always supposed to be governed in the premium by the ordinary length of the voyage, and the course of the trade."

The underwriters, having charged a premium to an interior point and having received it with knowledge of the exigencies of the voyage (delivery into customs and delays which might be encountered there in effecting clearance), cannot now defeat the insurance protection bargained for, especially where "loss in customs" was covered and the stay in customs rested upon the action of governmental officials, not the petitioner or consignee.

Statement "includes * * *" or "including * * *" relate to coverage already extended and do not create new coverage.

"Additional premium," if any, to be claimed under such clause is an inchoate right to mature only upon due demand and refusal.

We refer to the following clauses (Transcript, pp. 46a, 49a):

> "Including, if so declared hereon, risk whilst in store after arrival at port of discharge or in warehouse after arrival at final destination for 30 days thereafter held covered at an additional premium."
>
> "Includes risk for additional 30 days after discharge from vessel."

These are words of emphases and will not be deemed words of inclusion of part of a risk to effect exclusion of other parts of the coverage. A well established principle of

construction involving insurance contracts is that "the whole policy, with all its provisions" must be construed together "with no portion receiving such a construction as will defeat the obvious intent." (*Couch, "Cyclopedia of Insurance Law"*, Vol. 1, Sec. 176.)

The contentions on this construction, pro and con, were fully met in the District Court with Judge Ryan saying (Transcript, p. 123a):

> "Without entering upon a semantics discussion I do not read the words 'includes' as 'limits' so as to narrow an otherwise broad liability concededly undertaken, but rather as to emphasize one specific portion of the overall coverage."

The Court of Appeals, commenting somewhat extensively on the first "including" clause quoted above, seems to hold that it established wholly separate coverage to cover storage en route, i.e., after discharge from vessel at Valparaiso. It seems to ignore completely the fact that at Valparaiso the goods went into customs, and that holding in customs was not storage or warehousing and not a separate risk which required an additional premium. The reference to an additional premium in the above quoted "held covered" clause, which the Court of Appeals refers to as the storage clause, is directed specifically to the final destination, i.e., the point at which transit would naturally terminate—the holding of goods there would be a storage for the account of whom it might concern, for an additional premium. That provision was entirely understandable, since having arrived at final destination, with duties having been paid at Valparaiso, there would be no reason other than the convenience of the consignor or the consignee to hold the goods in whatever warehouse might be available.

The error of the Court of Appeals, in holding that there was in fact separate storage entirely outside the covered risks of transit, then leads it to hold that this separate risk required a separate premium which, not having been paid, leaves the underwriters free to disclaim any liability

whatsoever under the policy. This in spite of the fact that the underwriters have not claimed any premium due for storage. They did not claim it here, and they did not claim it on any previous shipments where the holdings at Valparaiso were almost equally lengthy.

To support the theory that a separate premium was due for a storage risk, the Court of Appeals refers to the "Warehouse Extension" rate which appears in the Memorandum of Open Cover in the following words (Transcript, p. 40a):

> "m. WAREHOUSE EXTENSION
>
> Each thirty (30) days, or part thereof, in excess of the first (30) days 0.125%"

There is nothing in the Open Cover to explain where that warehouse extension rate would apply. We must, therefore, seek a context in the certificate. There, the only place where there is reference to an additional premium is in the "held covered" clause, which speaks of warehousing at the final destination for a period beyond thirty days there.

It is elementary that the Courts do not favor forfeiture of vested rights. In this case, forfeiture invoked is of the entire course of the remaining transit from Valparaiso to destination, i.e., Santiago.

In *Hyderabad (Deccan) Co.* v. *Willoughby*, Law Journal Reports 1899, Queens Bench Division, N. S. Vol. 68 (p. 862) the Court, considering a Lloyd's policy containing language, in substance, similar to the "held covered" clause here present, held the insurer liable although the Court found a deviation in fact which entitled the insurer to an additional premium. The Court said (p. 865):

> "I have said that I think the delay at Secunderabad was unreasonably long, and it follows that I find there was at that place an unjustifiable deviation; but it was a deviation in the course of the voyage; the intention to forward the box to London was never abandoned; the most that can be said is

that the plaintiffs were too long about it; the insured voyage was never given up, nor was the box ever dealt with by the plaintiff in a way which was inconsistent with the intention to prosecute the adventure to its end. I think, therefore, that the risk at Secunderabad was a transit risk. But the unreasonable delay there amounted to a deviation not covered by the premium paid. What then? *The deviation clause in the policy comes into operation,* and the underwriters are entitled to a reasonable additional premium * * *.

The terms of the policy point out the route to be followed; but possible deviations are contemplated and provided for. The deviation in this case was, in my opinion, one of them, and it follows that the underwriters must pay." (Italics ours.)

In the instant case there could be no similar finding of additional premium due since "deviation, delay * * *" were fully within the coverage and the premium paid (see last quoted clause, p. 4, *supra*).

Incidentally, the Court of Appeals, to support its conclusion, refers to the Chilean insurance, saying (Appendix hereto, p. 9a):

"Also, we think it of significance that the Bank of Chile interpreted the contracts as we believe the assured intended them to be interpreted. After arrival of the shipments the Bank of Chile held for collection the sight documents to which the certificates were attached. Upon expiration of the 30 days after discharge at Valparaiso the Bank on behalf of the consignee obtained fire insurance on each shipment."

This is not construction by the acts of the parties. We have pointed out that the Banco de Chile may have been actuated by entirely different theories, namely, its duty as a fiduciary to cover the goods at fixed location in Chile by insurance obtained from a Chilean insurance company covering only fire attendant to newly acquired situs.

In the course of this entire argument we have quoted freely from the opinion of the District Court where necessary to show variances between findings of fact by that

Court and assumptions and conclusions at variance therewith by the Court of Appeals, having in mind the well established rule that findings by the District Court sitting without a jury are final and conclusive, and that unless its judgment based on such findings is clearly erroneous it is error for the Court of Appeals to set aside the judgment. (*McAllister* v. *United States*, 75 Sup. Ct. 6, 348 U. S. 19.)

Permission is sought for review by this Court because of the far reaching implications of this case on our foreign trade and commerce. Marine insurance coverage is basic to such trade, not only as between the parties directly engaged therein, but to banks and financial institutions which have to support that trade.

Conflicts in decisions of coordinate jurisdictions as well as differences in guiding principles and the application thereof to bring decisions of lower courts into harmony with those enunciated by the Supreme Court must be reconciled.

All possible doubts as to stability and continuity of insurance coverage must be resolved.

There is also involved the processes of coordination of currency controls and regulations under the laws and usages of other countries as it affects our foreign commerce and the due observance of comity.

It is respectfully submitted that a review of this case will serve a very general public interest.

CONCLUSION

For all of the foregoing reasons it is respectfully submitted that a writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit in favor of respondent and against petitioner.

Respectfully submitted,

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Appendix to Petition

(Opinion of Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 182—October Term, 1957.

(Argued March 3, 1958 Decided July 31, 1958.)

Docket No. 24836

INDUSTRIAL WAXES, INC., a corporation,

Plaintiff-Appellee,

—v.—

GERALD FEW BROWN,

Defendant-Appellant.

Before:

LUMBARD, WATERMAN and MOORE,

Circuit Judges.

Appeal from the United States District Court, Southern District of New York; Sylvester J. Ryan, *Judge*.

Defendant, Gerald Few Brown, appeals from a judgment of $43,803 plus interest and costs entered against him in a contract action based upon diversity of citizenship. Reported below at 160 F. Supp. 230.

Reversed.

LESTER C. LOCKWOOD, Esq., New York, N. Y. (Milton B. Ignatius, Esq. and Joseph S. Catalano, Esq., New York, N. Y., on the brief), *for Plaintiff-Appellee.*

Appendix to Petition

DANIEL L. STONEBRIDGE, Esq., New York, N. Y. (Raymond W. Mitchell, Esq. and Dow & Stonebridge, on the brief), *for Defendant-Appellant.*

MOORE, *Circuit Judge*:

This is an appeal by defendant Brown, a subject and resident of Great Britain, from a final judgment in a diversity action entered in favor of the plaintiff, an Ohio corporation, for $43,803 plus interest and costs.

The facts dispositive of the appeal are not in dispute. The plaintiff, Industrial Waxes, Inc., is engaged in exporting petroleum waxes to South America. These shipments are covered by marine insurance issued by a group of English underwriters, of which the defendant is a member, doing business under the name of Lloyd's.

In 1951 plaintiff made a contract to sell to Nacional De Velas, S. A. of Santiago, Chile 500 tons of semi-refined paraffin wax, $7.80 per 100 lbs., FAS New Orleans, CIF Valparaiso, documents at sight through the Bank of Chile. In fulfillment of this contract it undertook to effect five shipments of waxes from Tulsa, Oklahoma to Santiago via New Orleans, La. as port of exit and Valparaiso, Chile as port of entry. The first three shipments apparently arrived without incident. The final two shipments, having a combined declared value of $43,803, on about April 9, 1951 and June 13, 1951, respectively, were transported by steamer to Valparaiso, arriving there for reshipment inland on May 3, 1951 and July 6, 1951. Upon arrival each shipment was placed in the Customs' warehouse at the waterfront and remained in storage there awaiting the procurement by the purchaser of the requisite amount of United States dollars to meet the sight documents.

On October 5, 1951, more than five months after the arrival of the next to last shipment and three months after the final shipment, the waxes were still in the Customs' warehouse on the Valparaiso waterfront. The undisputed finding of the trial court was that "a delay of this length in a customs' warehouse pending entry was neither unusual nor unexpected and was long a matter of common knowledge to exporters to the West Coast of South America." On the evening of October 5, 1951 a fire ravaged the warehouse and destroyed the waxes.

To insure its merchandise plaintiff obtained from Lloyd's an annual open cover of insurance for its foreign shipments. The open cover set forth the voyages covered ("To, from and/or between places Anywhere in the World"), the types of merchandise covered, the applicable rates, and the general terms of the conditions of insurance. The rates relevant here are those applicable to general merchandise shipped under deck from the Gulf Coast, U. S. A. to the West Coast South America, Interior at .78625% of declared value and from the Gulf Coast to West Coast South America Ports at .68%. Of special significance is the warehouse extension clause which contains the following rate:

> "Each thirty (30) days, or part thereof, in excess of the first thirty (30) days .0.125%"

Attached to and made a part of the open cover is a series of printed clauses entitled "INSTITUTE CARGO CLAUSES (W. A.)." The actual insurance on specific shipments was obtained by the issuance of individual certificates of insurance under the open cover.

At the bottom of the printed page of Institute Cargo Clauses attached to the open cover the following caveat appears in bold type:

"NOTE—It is necessary for the assured to give prompt notice to Underwriters when they become aware of an event for which they are 'held covered' under this policy and the right to such cover is dependent on compliance with this obligation."

Clause 1 of the Institute Cargo Clauses is a warehouse to warehouse clause under which the insurance on a shipment would have expired thirty days after arrival at the port of discharge (Valparaiso). However, the trial court found, and the appellant does not dispute the fact, that this clause was superseded by the warehouse to warehouse clause contained in the certificates of insurance.

Upon issuing the open cover Lloyd's agent at Montreal would furnish plaintiff with a pad of printed certificates of insurance. To insure a shipment, the plaintiff would fill out on a certificate the shipping data, the declared value, and any additional conditions authorized by the certificate, and attach it to the shipping documents, sending a duplicate to Lloyd's Montreal agent for billing purposes. Except for the shipping data, the two certificates involved here are identical.

The caveat "NOTE" contained in the open cover is repeated in bold face type at the bottom of each certificate. This warning is reinforced by Clause 6 of the Cargo Clauses which provides:

> "This insurance shall in no case be deemed to extend to cover loss damage or expense proximately caused by delay or inherent vice or nature of the subject-matter insured."

The two clauses in the certificate, the interpretation of which is the crux of the appeal, are the warehouse to

warehouse clause and the storage declaration clause. The warehouse to warehouse clause, Cargo Clause 1, reads as follows:

> "This insurance attaches from the time the goods leave the warehouse at the place named in the policy for the commencement of the transit and continues until the goods are delivered to the final warehouse at the destination named in the policy or a substituted destination as provided in Clause 3 hereunder."

The storage declaration clause appearing on the face of the certificate provides:

> "Including, if so declared hereon, risk whilst in store after arrival at port of discharge or in warehouse after arrival at final destination for 30 days thereafter held covered at an additional premium."

Immediately after the storage clause this following condition is stated:

> "Including, if so declared hereon, risk whilst in warehouse awaiting shipment, at an additional premium for each 30 days subject to a limit of $500,000 any one location."

On the top of each certificate plaintiff typed the following declarations of coverage:

> "INSURE CUSTOMER AGAINST ALL RISKS TO CUSTOMER'S WAREHOUSE ALSO PARTICULAR AVERAGE AND LOSS IN CUSTOMS
> "INCLUDES RISK FOR ADDITIONAL THIRTY DAYS AFTER DISCHARGE FROM VESSEL."

In the final analysis plaintiff's contention is that the necessary implication from the lack of an explicit limita-

tion on storage coverage at port of discharge in the warehouse to warehouse clause is that such storage extends for an unlimited period of time. However, it should be noted at the outset that both the open cover and the certificates of insurance unmistakably reveal that the policy issued was one of insurance for transportation, i.e., covering goods in shipment. Therefore no such implication of unlimited storage should be made in the absence of convincing proof that the parties intended and the contract provided such coverage.

In search of such evidence plaintiff relies heavily on the rate differential between an inland and port shipment. The cost of insurance to Santiago being .78625% and the cost of insurance to Valparaiso only .68%, or .10625% less, plaintiff argues that if it had wished to insure the goods only to Valparaiso it would have declared at the .68% rate. To hold that the insurance expired at Valparaiso, the plaintiff concludes, would be to cheat it out of its bargained for and explicitly stated coverage from Valparaiso to Santiago for which it had paid the higher premium.

An analysis of the terms of the policy on which this argument is based exposes its fallacy. Assuming that the goods had been destined only to Valparaiso and not for reshipment inland, at the time of the fire higher premiums than the ones plaintiff actually paid on these two shipments would have been required to cover the goods. Had Valparaiso been the final destination, insurance at the lower .68% rate would have expired thirty days after discharge. Thereafter, provided the assured gave prompt notice, the goods would have been held covered at the warehouse extension rate of .125% for each additional 30 days. Thus a total premium of .93% would have been required for coverage on the shipment in storage for three months (.68% + 2 × .125%), and a premium of 1.18% on the shipment in storage for five months (.68% + 4 ×

.125%). Yet plaintiff claims to be entitled to the same coverage at the .78625% premium rate.

The obvious reason for charging a slightly higher rate for inland shipments was that the goods would have to be off-loaded from an ocean vessel, placed upon a barge or pier, put in a warehouse, loaded onto a motor truck or railroad or combination of both, hauled inland to its destination, and then off-loaded from the carrier and delivered. It is axiomatic that the more frequently the goods are handled the greater will be the likelihood of damage or loss. To hold that the plaintiff for an extra .10625% received coverage not only for the additional handling which an inland shipment entailed, but also obtained coverage for months of storage in a warehouse at the port of discharge despite the fact that the charge for such warehouse extensions was an additional .125% per 30 days would be tantamount to excising the port rates from the open cover. Any exporter to a South American port conversant with the lengthy delays in customs would invariably declare at the inland rate thereby avoiding the warehouse extension charges and upon release of the goods from customs name the port as a substituted destination.

The terms of the insurance contract itself effectively refute the plaintiff's contention. The statement in Cargo Clause 6 printed on each certificate that loss caused by delay was not covered put the plaintiff on notice that the insurer was not furnishing it with an unlimited storage contract. The storage declaration clause in the certificate of insurance precisely delineates the scope of coverage in storage. Plaintiff argues that the phrase "Including, if so declared hereon, risk whilst in store after arrival at port of discharge * * * for 30 days thereafter held covered at an additional premium" should not be interpreted as limiting the coverage to 30 days. Any other interpretation, however, would render the clause meaningless surplusage.

The phrase "for 30 days" modifies "in store after arrival at port of discharge" as well as "in warehouse after arrival at final destination." This construction is also strengthened by the fact that the concluding phrase in the clause, "thereafter held covered at an additional premium" modifies both port of discharge and final destination. The "thereafter" implies the expiration of some time limit and that time limit must be the 30 days specified in the clause.

Reading the storage declaration clause in conjunction witth the warehouse to warehouse clause, the duration of coverage becomes apparent. Coverage does not attach until "the time the goods leave the warehouse" unless the assured declares otherwise, in which case the coverage attaches in the warehouse of origin at the warehouse extension rate. The coverage can in no event continue after "the goods are delivered to the final warehouse at the destination named" except that the assured can obtain an additional 30 days coverage at no cost if he so declares. While being transported the goods are continually covered, but they are not covered "whilst in store after arrival at port of discharge" unless the assured so declares and in that event are only covered under the certificate for 30 days after arrival. Thereafter they are held covered at the additional warehouse extension rate.

Plaintiff also suggests that it obtained storage coverage unlimited in time by its having typed on the face of the certificates the instruction to "INSURE CUSTOMER AGAINST ALL RISKS TO CUSTOMER'S WAREHOUSE ALSO PARTICULAR AVERAGE AND LOSS IN CUSTOMS." However, the insertion by plaintiff of the phrase "ALL RISKS" defined the coverage but not the time limitations thereon. In fact, at the time it executed the certificates plaintiff's own understanding of the coverage belies the interpretation it urges here because immediately beneath the statement concerning "ALL RISKS"

the plaintiff typed the following terms on both certificates thus showing that it did not regard the coverage to be of unlimited duration:

"INCLUDES RISK FOR ADDITIONAL THIRTY DAYS AFTER DISCHARGE FROM VESSEL"

By the insertion of this clause the assured indicated that it wished to avail itself of the free coverage for 30 days storage after arrival at the port of discharge afforded by the storage declaration clause. To hold, as plaintiff now asserts, that its endorsement was meaningless and a nullity would be to ignore its own interpretation of the contracts at the time it executed the certificates.

Also, we think it of significance that the Bank of Chile interpreted the contracts as we believe the assured intended them to be interpreted. After arrival of the shipments the Bank of Chile held for collection the sight documents to which the certificates were attached. Upon expiration of the 30 days after discharge at Valparaiso the Bank on behalf of the consignee obtained fire insurance on each shipment.

The assured had a wealth of experience in exporting to South America, and it could well expect delays of several months in clearing customs in Chile. Had it desired coverage for storage at Valparaiso for more than the 30 days provided in the certificates, it could have availed itself of this protection at the relatively small warehouse extension rate. Instead, nowithstanding the clear limitation contained in the storage declaration clause, the proviso in Cargo Clause 6 that loss proximately caused by delay was not covered and the warnings in both the open cover and certificates that the assured was required to give prompt notice of an event for which it was held covered, the plaintiff chose to remain silent while the goods stayed in storage for months. In so doing, the plaintiff avoided pay-

ing the premium required by the warehouse extension clause and thereby undertook to insure itself from the risks which such premiums would have covered. As such a self-insurer it cannot shift the loss.

The judgment is reversed and the complaint is dismissed.

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DEC ...
JAMES R. B...NING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 539

INDUSTRIAL WAXES, INC., a corporation,

Petitioner,

against

GERALD FEW BROWN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

DANIEL L. STONEBRIDGE,
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New York 5, N. Y.

WILBUR E. DOW, JR.,
of Counsel.

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OCTOBER TERM, 1958

No. 539

INDUSTRIAL WAXES, INC., a corporation,
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BRIEF FOR RESPONDENT IN OPPOSITION

Industrial Waxes, Inc., has petitioned for a Writ of Certiorari fo review the determination of the Court of Appeals for the Second Circuit which unanimously reversed the decision of the District Court thus absolving the respondent from liability and finding the petitioner to be a self-insurer at the time its merchandise was destroyed by fire. Respondent herein, Gerald Few Brown, respectfully opposes the granting of such writ.

Questions Presented.

Whether this Court, contrary to the expressed intent of Rule 19, should grant review to the unanimous decision of the Court of Appeals in a dispute between parties to a private contract, when such decision concerns a question of contract construction of interest only to the parties to this litigation, is fully compatible with the accepted and customary course of judicial proceedings and is, insofar as the questions concerned have been litigated, fully consistent with applicable decisions of this Court and of other Courts of Appeals.

Statutes Involved.

This case does not turn upon the construction of the Constitution or any statute, rule or regulation of the United States or of any state or local subdivision thereof.

Statement.

The facts elicited from testimony and evidence in this litigation have been fully set forth by the Court of Appeals in its opinion (P. 1a-10a)[1] and in the decision rendered by the trial court (D. A. 113a-127a). In conjunction with these recitals, petitioner has submitted a statement which requires certain clarification due to its failure to include certain salient points and due to its tendency to be misleading by a commingling of fact and editorial comment.

In brief, petitioner purchased insurance from respondent by means of an annual open cover policy, which allowed petitioner, as a shipper, to describe, and declare the value of, each shipment on certificates torn from a pad supplied by the respondent. These certificates became, for all intents and purposes, the policy of insurance as to third parties and, as noted in the decision below, are considered to constitute the contracts in the present dispute. Petitioner was free to declare coverage on the certificates with appropriate language consistent with the terms of the open cover. This the petitioner did, thus writing its own policy of insurance which was binding upon Underwriters.

In May and July, 1951, petitioner shipped two consignments of paraffin wax from Tulsa, Oklahoma, to Santiago, Chile. In October, 1951, while still in a Custom's enclosure at Valparaiso, Chile, the consignments were destroyed by fire.

[1] References to material contained in the Appendix annexed to the petition are indicated by P. followed by the page number. References to material contained in the Appendix submitted by defendant-appellant below are indicated by D. A. followed by the page number.

At the time of shipment, petitioner caused to be typed on the certificates accompanying the two shipments in question the following terms:

> "INSURE CUSTOMER AGAINST ALL RISKS TO CUSTOMER'S WAREHOUSE ALSO PARTICULAR AVERAGE AND LOSS IN CUSTOMS"
>
> "INCLUDES RISK FOR ADDITIONAL THIRTY DAYS AFTER DISCHARGE FROM VESSEL."

The Court found that petitioner, from its choice of language, was aware of the important aspects of the policy of open cover insurance which it had purchased and the trade in which it was engaged. These were:

(1) That there was likely to be a substantial delay between entry of goods in Customs at Valparaiso, Chile, and final delivery at an inland destination in Chile.

(2) That in order to secure protection of the goods for a thirty day period following discharge from ocean vessel at Valparaiso in accordance with the storage declaration clause, it was necessary to make an appropriate declaration on the face of the certificate.[2]

(3) That it not only "seems to have been the custom" (Petition, P. 7) but was a well-known fact that following the first thirty day period the Banco de Chile would cause fire insurance to be placed with Chilean Underwriters upon import goods held in Chilean Customs warehouses.

(4) That, in the face of the absolute requirements stated on both the certificate forms and the open cover policy that the assured must give prompt notice of a "held covered" situation and the knowledge of petitioner that the goods were in such a situation, no effort was made by petitioner to comply with the contractual condition, thus causing the insurance to lapse.

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[2] "Including, if so declared hereon, risk whilst in store after arrival at port of discharge or in warehouse after arrival at final destination for 30 days thereafter held covered at an additional premium.

The fourth point rests upon the following policy language:

> "NOTE — It is necessary for the assured to give prompt notice to Underwriters when they become aware of an event for which they are 'held covered' under this policy and the right to such cover is dependent on compliance with this obligation" and
>
> "Each thirty (30) days, or part thereof, in excess of the first thirty (30) days 0.125%.

Respondent submits that with this state of facts there are no considerations raised which could affect the public interest or the existing state of law. The entire record establishes that the decision of the Court of Appeals was eminently correct, fully justified and logically and legally the only result attainable herein.

Petitioner's President testified that he was in Chile in either August or September, 1951. During that visit he inquired about, and was given, the factual situation concerning the two shipments of waxes involved in this litigation (D. A. 107a). No attempt was made to impart such information to respondent nor was any premium offered for such coverage.

As to the first, testimony of petitioner's president, Edwin C. Price, and Chilean representative, Michael S. McGoldrick, indicates the knowledge by both that the time for clearing goods through Chilean Customs could be lengthy (Price, D. A. 106a; McGoldrick, D. A. 70a, 74a).

As to the second, petitioner's president indicated that he was fully familiar with all terms and conditions of the open cover insurance purchased on an annual basis from Underwriters at Lloyds and that he made a practice of endorsing the certificates in the manner quoted above (D. A. 16a, 91a-92a). Testimony of both the president and Chilean representative of the petitioner confirm the third point that petitioner was fully aware of the customary practice of

Banco de Chile in placing fire insurance on goods held in Customs for any period in excess of thirty days (Price, D. A. 111a; McGoldrick, D. A. 75a).

Argument.

Petitioner has set forth several proposals by means of which it seeks to place this litigation within the scope of causes subject to review by this Court. Because the points are somewhat unclear the respondent has taken the liberty of paraphrasing the various arguments set forth.

I. Whether the purchase of warehouse to warehouse transit insurance containing warehouse extension clauses creates a limitless responsibility upon underwriters to continue the insurance in effect until goods are finally destroyed.

Clearly the answer to this argument is that the language of the contract must control; that, as found by the Court of Appeals, insurance coverage under the policy in dispute expired thirty days after the goods were discharged from the vessel due to failure of the petitioner to extend the period of coverage. Emphasis by the petitioner of the fact that it exercised no control over the goods does not alter the limitations in the insurance contract; the controlling factor is the requirement that Underwriters be promptly informed of any discontinuance of transit and that appropriate premiums be paid by an Assured in order to keep the insurance cover in full force and effect.

Petitioner has quoted portions of the policy which are admitted to be superseded and has failed to recite the replacing text as well as the warehouse extension clause, both of which are fully integral portions of the policy contract. Petitioner also argues that placing of goods in Customs is not to be considered warehousing, but during the five month period the goods were still considered to be in transit.

Such assertion is sought to be supported by citation of decisions, all of which were before the Court of Appeals and were found inapposite. This argument fails by the very fact that the policy includes certain wording:

> "Including, if so declared hereon, risk whilst in store after arrival at port of discharge . . . for thirty days thereafter held covered at an additional premium."

The issue sought to be raised by questioning the semantics of "warehousing" is nothing, if not a red herring. Whether the goods were in customs or on a dock congested with imported cargoes is of no concern to underwriters if the assured fulfills the conditions of informing underwriters and purchasing appropriate insurance for the period of time the goods are prevented from going forward to inland destination.

The argument that Underwriters were or should be aware of delays to be anticipated in clearing Chilean customs loses complete force when it is apparent from the policy contract that Underwriters have taken this contingency into account in the language of the policy insuring the goods.

II. Whether the typewritten declaration placed on the certificate of insurance by the assured, confirming that coverage is desired for a period which is allowed under the policy (if such declaration is made), serves to enlarge underwriters' contractual obligations beyond the termination of the period covered by such declaration.

The quite apparent answer to the foregoing is that the Assured, in accepting a right conferred by the contract of insurance, accepted termination of such coverage unless the Underwriters have received notification that insurance cover is requested for an additional period of

time. Along with the notification is the requirement that the Assured pay additional premiums in order to secure the additional cover. The assertion by the petitioner that the burden was upon respondent to claim additional premium on these shipments and on earlier similar shipments is belied by the fact that respondent had no knowledge nor any means of knowledge, other than through the petitioner, of the position of shipments. It required presentation of a claim to acquaint the insurer of the true facts. Good fortune of petitioner in having no previous losses prevented the respondent from deriving information in the same manner on previous shipments.

III. Whether it was an error for the unanimous Court of Appeals to reverse a decision by the District Court and to set aside the judgment entered by the District Court.

Prior to trial of the issues counsel for petitioner and respondent propounded and reached agreement upon a stipulation of the principle facts governing this dispute and of the positions taken by each party. This stipulation was before the Court as a pre trial order marked "Exhibit 1".

Prior to trial, deposition testimony was taken of Edwin C. Price, President of the petitioner herein, and Michael S. McGoldrick, Chilean agent for the petitioner. Those depositions were submitted to the District Court as "Exhibit 2" and "Exhibit 3".

On trial some additional testimony was taken by the parties of Edwin C. Price and from A. Henry Smith, an expert, placed on the stand by the respondent herein whose testimony was discounted in full by the trial court.

The stipulation of facts, deposition testimony and brief examination of the two witnesses at trial were contained in the Appendix submitted by the defendant-appellant on appeal to the Court of Appeals. That Court had before

it the same record that the trial court was able to consider. The Appellate Court was unable to confirm the findings of the District Court and was compelled to set aside the judgment rendered in the District Court. Upon concluding that the District Court had misconstrued and misapplied the applicable law. Such action is particularly and clearly the function for which appellate procedure is provided. Failure of the Court of Appeals to reverse the erroneous decision of the lower court would have constituted an abdication of its function.

CONCLUSION.

For the reasons set forth herein, it is respectfully submitted that the petition should be denied.

Respectfully submitted,

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